117 (1) No. 08-[illegible] [illegible] 15 2009

IN THE OFFICE OF THE CLERK
Supreme Court of the United States

LEONARDO DIAZ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, James McDonough, ATTORNEY GENERAL OF THE STATE OF FLORIDA, Bill McCollum,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the resolution of the petitioner's double jeopardy claim is controlled by *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (the unconstitutional submission of a jeopardy-barred greater charge to a jury is not harmless beyond a reasonable doubt simply because the jury convicts on a lesser, but properly submitted, charge) rather than, as found by the state reviewing court, *Morris v. Mathews*, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) (jeopardy-barred conviction of greater offense by jury adequately remedied by reduction to conviction for lesser offense that was not jeopardy-barred).

II.

Whether the holding of the court of appeals -- that the state appellate court's rejection of the petitioner's double jeopardy claim could not involve an unreasonable application of Supreme Court law because "there is no Supreme Court law on point" with the petitioner's double jeopardy claim, and that the double jeopardy principles of *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) and *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) do not constitute "clearly established Federal Law, as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254(d)(1) because, unlike the petitioner's case, neither decision "involved a hung jury" -- conflicts with *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (a state court

errs when it unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context where it should apply) as well as *Illinois v. Somerville*, 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973) (in double jeopardy cases concerning the existence of manifest necessity for a mistrial, "... virtually all of the cases turn on the particular facts and thus escape meaningful categorization.").

III.

Whether the court of appeals, in conflict with *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (holding that in order to proceed with a retrial after a mistrial has been declared over the defendant's objection in the first trial, the prosecutor bears the "heavy burden" of demonstrating "manifest necessity"), erred in finding that a manifest necessity for mistrial existed based upon a mere possibility of what the petitioner's jury might have done.

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OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Diaz v. Secretary, Department of Corrections*, 2008 WL 2620194 (11th Cir.2008), affirming the denial of the petitioner's 28 U.S.C. § 2254 habeas corpus petition by the United States District Court for the Southern District of Florida, is contained in the Appendix. (App. 1-12).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on July 3, 2008. (App. 1-12). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to February 12, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides in relevant part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

The facts as related by the United States Court of Appeals for the Eleventh Circuit are as follows:

"[Petitioner] Diaz was indicted for premeditated [first-degree] murder. At the conclusion of his jury trial on this charge, the state trial court instructed the jury:

> In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crime(s) of which he is accused, there may be evidence that he committed other acts that would constitute a lesser included crime. Therefore, if you decide that the main accusation [of first-degree murder] has not been proved beyond a reasonable doubt, you will next decide if the defendant is guilty of any lesser included crime. The lesser included crimes indicated in the definition of First-degree murder are: second-degree murder [and] manslaughter. [emphasis supplied]

"After deliberating, the jury informed the state trial court that it could not reach a unanimous verdict, as 11 jurors felt the evidence supported a second-degree-murder conviction, while one juror 'was holding out for manslaughter.' The state trial court gave the jury an '*Allen* charge,' and the jury continued deliberating the next day. The jury later returned, however, and informed the state trial court that it still could not reach a unanimous verdict. The jury did not explain its division, and the state trial court asked that the jury express in a note that it was deadlocked, without any indication of its division. The state trial court judge and the attorneys met in chambers. Diaz requested that the state trial court either poll the jurors on whether they had reached a verdict on the first-degree-murder charge or ask that the jurors return a verdict form indicating their verdict as to its charge. [The verdict form only presented the jury with the options of finding the petitioner guilty of first-degree murder, guilty of second-degree murder, guilty of manslaughter, or not guilty.] The state trial court declined, in accordance with its custom to refuse to

take a verdict on the greater offense when the jury is hung on the lesser-included offenses, and declared a mistrial.

"The state then moved to retry Diaz for first-degree murder. Diaz moved to dismiss the charge, on the ground that the jury at the first trial implicitly acquitted him of this charge. The state trial court denied the motion. At the close of the state's evidence at the second trial, Diaz renewed his motion to dismiss on double jeopardy grounds. The state trial court denied the motion. At the close of the evidence and instructions, the jury began deliberations. At some point in the deliberations, the jury indicated that its members were split, six voting for a second-degree-murder verdict and six voting for a not-guilty verdict. After resuming deliberations the following day, the jury found Diaz guilty of manslaughter.

"On direct appeal to the state appellate court, Diaz argued the following. The state trial court *sua sponte* granted a mistrial without exploring the alternatives or finding manifest necessity for a mistrial. Thus, pursuant to Supreme Court law, his retrial for first-degree murder was prohibited by the Double Jeopardy Clause. Also, the jury's indication that it was deadlocked as to the lesser-included offenses, coupled with the jury's instruction not to consider the lesser-included offenses unless it found that the evidence did not support a first-degree-murder conviction, demonstrated that the jury 'impliedly acquitted' Diaz of first-degree murder, such that he should not have been retried on this charge. The fact that he ultimately was convicted of a lesser-included offense at his second trial does not render his retrial for a jeopardy-barred offense harmless, as he should not have been put through the ordeal of a second

first-degree-murder trial and because it could not be said that the first-degree-murder charge did not influence the jury to convict him of manslaughter. Accordingly, reversal of his conviction and retrial for only manslaughter were necessary.

"The state appellate court per curiam affirmed Diaz's conviction, without reasoning save citations to [*Morris v.*] *Mathews*, [475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986)] and *Commonwealth v. Roth*, 437 Mass. 777, 776 N.E.2d 437 (2002), and *A Juvenile v. Commonwealth*, 392 Mass. 52, 465 N.E.2d 240 (1984). *See Diaz v. State*, 844 So.2d 655, 656 (Fla.Dist.Ct.App.2003)." (App. 2-5). The petitioner timely petitioned for review of his double jeopardy claim in the Supreme Court of Florida which was dismissed on June 23, 2003. (App. 15).

The petitioner timely filed with the district court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (App. 28-46). The district judge entered an order denying the petition. (App. 13-27). In pertinent part, the district judge reasoned that the petitioner's double jeopardy rights were not violated when the state trial court granted a mistrial and retried the petitioner for first-degree murder because the first jury was deadlocked. *Id.*

The petitioner timely appealed to the Eleventh Circuit. Based upon the foregoing facts quoted from the decision of the court of appeals, the Eleventh Circuit found that the petitioner did not meet his burden to demonstrate, under 28 U.S.C. 2254(d)(1), that the state appellate court's affirmance of his conviction was contrary to the law as clearly established by this Court because "there is no Supreme Court law on point" that "involve[s] a hung jury." (App. 11). The Eleventh Circuit further found that although the jury remained deadlocked after the Allen charge, it was "possible"

that the jury had revisited the first-degree murder issue thereafter. (App. 12).

ARGUMENT

I.

The resolution of the petitioner's double jeopardy claim is controlled by *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (the unconstitutional submission of a jeopardy-barred greater charge to a jury is not harmless beyond a reasonable doubt simply because the jury convicts on a lesser, but properly submitted, charge) rather than, as found by the state reviewing court, *Morris v. Mathews*, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) (jeopardy-barred conviction of greater offense by jury adequately remedied by reduction to conviction for lesser offense that was not jeopardy-barred).

A. AEDPA Standards

The petitioner's double jeopardy claim arises in the context of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. Under the AEDPA, if a state court has adjudicated a claim against the petitioner, a federal court may grant habeas relief only if the state court's adjudication was contrary to, or an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 403-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The unreasonable application clause from § 2254 is highly

deferential to state courts. Under this standard, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly," *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (citation omitted), or even if it finds the state court's actions to be "clear error." *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Nevertheless, this standard does allow the issuance of the writ for state court actions that are "objectively unreasonable." *Id.* In defining what is unreasonable, this Court has remarked that every application of law has a certain range of reasonableness, but that ultimately "[t]he term 'unreasonable' is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140, 2149, 158 L.Ed.2d 938 (2004) (citing *Williams v. Taylor*, 529 U.S. at 410-11).

Here, neither the state trial court nor state reviewing court provided any reasons for rejecting the petitioner's double jeopardy claim. In such a case, the deferential standard of review prescribed by the AEDPA does not apply because the federal court's review of the petitioner's claim is "not circumscribed by a state court conclusion...". *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

B. The Applicable Double Jeopardy Law

A state is prohibited from placing a criminal accused twice in jeopardy for the same offense. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The primary rationale underlying this constitutional protection is that a state must not be permitted "to make repeated attempts to convict an

individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Because, however, "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy," *Ball v. United States*, 163 U.S. 662, 669, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), "it is not ... essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge." *Green*, 355 U.S. at 188, 78 S.Ct. 221. Rather, "in a jury trial jeopardy attache[s] when the jury is empaneled and sworn." *Crist* v. *Bretz*, 437 U.S. 28, 38, 98 S.Ct. 2156, 2159, 57 L.Ed.2d 24 (1978).

In *Green*, the defendant was indicted on charges of arson and first-degree murder. At trial, the jury was instructed that it could find the defendant guilty of either first-degree murder or second-degree murder under the first-degree murder count. *Id.* at 185-86. The jury convicted the defendant of arson and second-degree murder but rendered no verdict on the charge of first-degree murder. On appeal, the second-degree murder conviction was reversed, and on remand the defendant was tried and convicted of first-degree murder as charged in the original indictment. *Id.* at 186. This Court held that double jeopardy prohibited the defendant's conviction for first-degree murder. This Court noted that the jury gave no indication that it was deadlocked or unable to reach a verdict as to the first-degree murder charge; rather it was simply "silent" as to that charge. *Green*, 355 U.S. at 186, 190-91. This Court thus concluded that the jury's silence on first-degree murder coupled with its conviction of the

defendant on second-degree murder was an "implicit acquittal" of the first-degree murder charge, thus terminating jeopardy. *Id.* at 190. Moreover, "the jury was dismissed without returning any express verdict on that charge [of first-degree murder] and without Green's consent." *Id.* at 191. It therefore followed that "... Green's jeopardy for first-degree murder came to an end when the jury was discharged so that he could not be retried for that offense." *Id.*

Of course, this Court has never held that "every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *See Wade v. Hunter*, 336 U.S. 684, 688, 69 S.Ct. 834, 93 L.Ed. 974 (1949). Rather, this Court has stated "that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 689. *See also United States v. Jorn*, 400 U.S. 470, 480, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) ("[A] mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide."). Nevertheless, because a criminal defendant's right to have his trial completed by a particular tribunal is substantial, and any mistrial frustrates that right, the prosecution must overcome a heavy burden in justifying a mistrial over the defendant's objection if the double jeopardy bar is to be avoided. As early as 1824, this Court stressed that "the power (to declare a mistrial) ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *United States v. Perez*, 22 U.S. (9

Wheat). 579, 6 L.Ed. 165 (1824).

Accordingly, from *Perez* to date, it has been the clearly established law of this Court that where a judge declares *sua sponte* a mistrial on a charge without a defendant's consent and where all possible alternatives were not considered, employed and found wanting, retrial on that charge is barred by the Double Jeopardy Clause. *Perez, supra* (unless there is a "manifest necessity" for declaring a mistrial without a defendant's consent, retrial is barred under the Double Jeopardy Clause). *Accord, Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); *Jorn*, 400 U.S. at 485, 91 S.Ct. at 557. In other words, when a jury has been discharged without consent of the defendant and without a manifest necessity, the discharge is the equivalent of an acquittal and retrial is prohibited.

A jury deadlock can give rise to a manifest necessity for a mistrial. *See, e.g., Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892) (reprosecution not barred where jury discharged after 40 hours of deliberation for inability to reach a verdict). However, in such a case, a "high degree" of necessity is required to establish a mistrial due to the hopeless deadlock of jurors, *Washington*, 434 U.S. at 506, and the record must reflect that the jury is "genuinely deadlocked." *Richardson v. United States*, 468 U.S. 317, 324-25, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984).

C. The Absence of Manifest Necessity, the Presence of an Implied Acquittal.

Here, the record is devoid of any showing of a manifest necessity for the trial judge's declaration of mistrial *on the charge of first-degree murder* over the petitioner's objection. Any suggestion that the mistrial was justified due to a jury deadlock fails because the jury wrote in a note to the trial judge that it was deadlocked between the two lesser included charges. The record shows no deadlock as to the charge of first-degree murder.

To the contrary, the record shows an implied acquittal on the charge of first-degree murder. The jury was instructed to consider the lesser charges only if there was reasonable doubt as to the petitioner's guilt of first-degree murder (often referred to as an "acquittal-first" or "hard transition" instruction). "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000). Thus, the announced deadlock as to the two lesser charges, coupled with the instruction, meant that the jury determined prior to consideration of the lesser charges that there was reasonable doubt as to the petitioner's guilt of first-degree murder, notwithstanding the absence of an express verdict on the charge of first-degree murder. *See Green* (jury's silence on first-degree murder coupled with conviction on second-degree murder constituted an implied acquittal of first-degree murder thereby rendering retrial on first-degree murder charge jeopardy-barred).

The record here is not simply devoid of the high degree of necessity and evidence of genuine deadlock required by this Court's decisions in *Washington* and *Richardson* to have warranted a mistrial on the first-degree murder charge, the record squarely refutes any

such necessity. Of course, the jury's genuine deadlock as to second-degree murder and manslaughter warranted a mistrial declaration, but only upon those charges. Thus, a new trial on the higher charge of second-degree murder is not jeopardy-barred. But the retrial of the petitioner on first-degree murder was violative of this Court's clearly established double jeopardy jurisprudence.

D. The Petitioner's Double Jeopardy Claim is Controlled by *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), not *Morris v. Mathews*, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986).

The state reviewing court, in its per curiam affirmance without opinion, rejected the petitioner's federal double jeopardy claim, citing *Morris v. Mathews*, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986). In *Mathews*, although a jeopardy-barred offense was submitted to the jury, relief was not afforded the defendant due to an absence of prejudice based upon the particular facts of that case. Upon the distinguishing facts of the petitioner's case, however, the controlling decision on the issue of prejudice is *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

The defendant in *Price* was charged with murder and the jury found him guilty of the lesser offense of manslaughter. The manslaughter conviction was reversed. Price was retried for murder and reconvicted of manslaughter. This Court held that the retrial for murder violated the Double Jeopardy Clause. The state argued that the double jeopardy violation was harmless because the jury convicted Price of manslaughter rather than the jeopardy-barred offense

of murder. This Court rejected the state's argument. The following reasoning from *Price* is directly on point with the petitioner's case:

> The Double Jeopardy Clause ... is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. *Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.*

Id. at 331, 90 S.Ct. at 1762 (emphasis supplied). This Court vacated Price's manslaughter conviction and ordered a retrial on the manslaughter charge only.

Instead of applying *Price*, the state appellate court applied *Mathews* which is so clearly inapposite that in relying upon that decision rather than *Price*, the state court holding was "contrary to ... clearly established Federal law, as established by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Mathews*, the defendant appealed a conviction of aggravated murder, claiming his prosecution for the crime following a separate conviction for the underlying crime of aggravated robbery violated double jeopardy principles. The Ohio Court of Appeals agreed with the defendant but entered judgment against him on the lesser included offense of murder in accordance with an Ohio rule of criminal procedure.

Upon review, this Court found no constitutional infirmity to the Ohio practice because the defendant failed "to demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-

barred offense." 475 U.S. at 247, 106 S.Ct. at 1038. This Court explained that the presumption of prejudice that was present in *Price* was absent in Mathews' case because "[t]he jury did not acquit Mathews of the greater offense of aggravated murder, but found him guilty of that charge and, a fortiori, of the lesser offense of murder as well." *Id.* (emphasis supplied).

In *Mathews*, this Court distinguished *Price* from cases in which the jury did not acquit the defendant of the greater offense, but found the defendant guilty of the greater offense and, by implication, the alternative lesser offense. In such cases, the burden rests upon the defendant to establish that being tried twice for the greater offense tainted the conviction of the lesser offense. As this Court held in *Mathews*: "*Price* did not impose an automatic retrial rule.... Rather, the Court relied on the likelihood that ... the charge of the greater offense for which the jury was unwilling to convict also made the jury less willing to consider the defendant's innocence on the lesser charge.... The jury did not acquit Mathews of the greater offense ... but found him guilty of that charge and, *a fortiori*, of the lesser offense of murder as well." *Mathews*, 475 U.S. at 246.

Unlike in *Mathews*, the petitioner's jury did *not* convict him of the greater offense of first-degree murder. Rather, he was impliedly acquitted for the reasons previously stated. Moreover, the state trial judge *sua sponte* declared a mistrial, over the petitioner's objection, as to first-degree murder, even though the jurors announced no deadlock as to that charge.

Furthermore, the jury in the petitioner's second trial indicated that it was split, six voting for a second-degree-murder verdict and six voting for a not-guilty verdict. After resuming deliberations the

following day, the jury found petitioner guilty of manslaughter. Thus, precisely as this Court stated in *Price*: "[W]e cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." *Id.* at 331, 90 S.Ct. at 1762.

In view of the striking similarity of this case to *Price* and the clear factual distinctions between the petitioner's case and *Mathews*, the clearly established rule of law of this Court that applies is *Price*. Accordingly, the decision of the state reviewing court is contrary to the clearly established precedent of this Court, thereby warranting federal habeas corpus relief under 28 U.S.C. § 2254(d)(1) in the form of a new trial on the charge of the non-jeopardy-barred offense of second-degree murder.

In addition to citing *Mathews*, the state reviewing court cited two Massachusetts decisions, *Roth, supra*, and *A Juvenile, supra*. However, these decisions neither address or resolve a federal double jeopardy claim such as the petitioner's, but merely interpret and apply Massachusetts criminal procedural rules. Moreover, the court in *Roth* effectively distinguished cases such as the petitioner's by noting that its analysis of the Massachusetts criminal procedure matter at issue would be different if, as in other jurisdictions, the jurors had been instructed not to consider lesser included offenses unless they first decided there was reasonable doubt as to the main accusation. *Roth*, 437 Mass. at 794, 776 N.E.2d at 449, n. 14. Florida is one of those other jurisdictions and the petitioner's jury was so instructed.

II.

The holding of the court of appeals conflicts with *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) and *Illinois v. Somerville*, 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973).

A. The Conflict with *Williams*

Whereas the state reviewing court relied upon this Court's decision in *Mathews* (thereby impliedly finding that there was a double jeopardy violation but that it was adequately remedied by the jury's conviction on a lesser charge), the Eleventh Circuit ruled that *Mathews*, *Price* and *Green* do not apply at all. In fact, the Eleventh Circuit reasoned that because none of the decisions of this Court relied upon by the petitioner involved a hung jury, the decision of the state appellate court could not be an unreasonable application of this Court's decisions because the petitioner's double jeopardy claim required an extension, rather than an application, of this Court's double jeopardy jurisprudence. (App. 12). The Eleventh Circuit's decision conflicts with *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Under the AEDPA, a federal court may not grant a writ of habeas corpus to a petitioner in state custody with respect to any claim adjudicated on the merits in the state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court...". 28 U.S.C. § 2254(d)(1). In *Williams*, this Court warned that "clearly established Federal law, as determined by the Supreme Court"

refers to Supreme Court decisions, not those of lower federal courts, and "refers to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. However, "clearly established law" does not mean the petitioner must produce a decision of this Court that is factually identical to his. As this Court also stated, a state court decision makes "an unreasonable application of this Court's precedent" when the court "unreasonably extends a legal principle from our precedent to a new context where it should not apply ..." but significantly, this Court added that a lower court also errs when it "unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407 (emphasis added).

In conflict with *Williams*, the Eleventh Circuit held the petitioner to a higher and different standard, requiring him to produce a decision of this Court factually identical to his, *i.e.*, involving a hung jury. Instead, the Eleventh Circuit should have recognized that the law applicable to the petitioner's double jeopardy claim, which was established by this Court as early as 1824 in *Perez*, applies to the context of the petitioner's case. This Court held in *Perez* that where a judge declares *sua sponte* a mistrial on a charge without a defendant's consent and where all possible alternatives were not considered, employed and found wanting, retrial on that charge is barred by the Double Jeopardy Clause. *Accord*, *Washington, supra; Dinitz, supra*; *Somerville, supra; Jorn, supra.* This line of authority from this Court established a principle of law that applies to the petitioner's case -- without regard to the first jury's deadlock as to second-degree murder and manslaughter -- because the mistrial declaration as to first-degree murder was without the petitioner's consent and without consideration of the alternatives

to mistrial.

Furthermore, the Eleventh Circuit's double jeopardy analysis -- that the decisions of this Court relied upon by the petitioner were "readily distinguishable" because the juries in those cases convicted the defendant's whereas the first jury in this case was deadlocked -- is flawed. In *Green*, this Court stated that "it is not ... essential that a verdict of guilt ... be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge." *Green*, 355 U.S. at 188, 78 S.Ct. 221. Rather, "in a jury trial jeopardy attache[s] when the jury is empaneled and sworn." *Crist*, 437 U.S. at 38. Here, jeopardy attached after the jury was sworn at the petitioner's first trial. The jeopardy violation took place when the mistrial was declared upon the charge of first-degree murder over the petitioner's objection, in the absence of manifest necessity, and without exploration of the alternatives to mistrial.

B. The Conflict with *Somerville*

Nor can the Eleventh Circuit's reasoning be squared with the law of this Court that in double jeopardy cases concerning the existence of manifest necessity for a mistrial, "... virtually all of the cases turn on the particular facts and thus escape meaningful categorization." *Illinois v. Somerville*, 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973). Given the fact-specific nature of double jeopardy claims such as the petitioner's, the reasoning of the Eleventh Circuit would render immune from federal habeas corpus relief state court double jeopardy violations resulting from mistrial declarations unsupported by manifest necessity simply because of unique facts where double jeopardy principles from

this Court were otherwise clearly applicable.

III.

The court of appeals erred in finding a manifest necessity for mistrial based upon a mere possibility of what the jury might have done after the *Allen* charge.

While recognizing that the jury's announced deadlock as to the lesser charges indicated that "it did not think Diaz should be convicted of first-degree murder" (App. 12), the Eleventh Circuit went on to state that after the *Allen* charge, it was "not clear that the jury, at this point also, did not think Diaz should be convicted of first-degree murder," even though the jury announced that it remained deadlocked." (App. 12). Thus, the Eleventh Circuit reasoned, it was "*possible* that the jury concluded that first-degree murder was not proved and began to discuss the lesser-included offenses on the first day of deliberations, but then revisited the first-degree murder issue on the second day of deliberations. Thus, the facts did not demonstrate an implicit acquittal sufficiently enough to call for an extension of established law." (App. 12) (emphasis supplied).

In *Washington*, this Court recognized that a defendant's right, pursuant to the Double Jeopardy Clause, to have his trial, once commenced, completed by a particular tribunal, is a "valued right," but one which must sometimes "be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 503 n.11. To proceed with a retrial after a mistrial has been declared over the defendant's objection in the first trial, the prosecutor bears the "heavy burden" of demonstrating "manifest necessity."

Id. at 505.

The Eleventh Circuit's holding on this point is in direct conflict with *Washington* by effectively relieving the prosecution of its heavy burden. Instead, the Eleventh Circuit engaged in pure speculation as to a "possibility" of what the jurors might have done after the *Allen* charge. However, weighing against that conjecture is what the record does show, namely, that the jurors were not deadlocked as to the charge of first-degree murder, that the jurors had in fact impliedly acquitted the petitioner of that charge, and that there was no showing whatsoever of any manifest necessity for a mistrial on the charge of first-degree murder. This conflict presents yet another reason for granting certiorari review.

One other aspect of the Eleventh Circuit's decision is also worthy of consideration. That court also ruled that the question of whether the state trial court erred in declaring a mistrial was beyond the scope of the Certificate of Appealability because the COA "asks only whether the state trial court violated the Double Jeopardy Clause by retrying [petitioner] for a charge of which the first jury impliedly acquitted him and, if so, whether he was prejudiced by this and merits a new trial for the lesser-included offenses only." (App.10).

This ruling demonstrates yet another fundamental misunderstanding of the double jeopardy issue by the Eleventh Circuit. The determination of manifest necessity is clearly inextricably intertwined with the implicit acquittal issue because there could be no manifest necessity for mistrial on the charge of first-degree murder without a genuine deadlock as to that charge -- and there could be no genuine deadlock if the jury implicitly acquitted on that charge.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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DATED: January, 2009

No. 08-928

IN THE
Supreme Court of the United States

LEONARDO DIAZ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, James McDonough, ATTORNEY GENERAL OF THE STATE OF FLORIDA, Bill McCollum,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. _____
Non-Argument Calendar

D.C. Docket No. 04-20724-CV-JAL

LEONARDO DIAZ,

Petitioner-Appellant,

versus

SECRETARY OF THE DEPARTMENT OF CORRECTIONS, James McDonough, ATTORNEY GENERAL OF THE STATE OF FLORIDA, Bill McCollum,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 3, 2008)

Before TJOFLAT, BLACK and FAY,
Circuit Judges.

PER CURIAM:

Leonardo Diaz, a Florida state prisoner serving a 30-year sentence after being convicted of the lesser included offense of manslaughter at a second jury trial for first-degree murder, appeals the district court's denial of his counseled petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. In his § 2254 petition, Diaz argued that the state trial court violated the Double Jeopardy Clause by retrying him for first-degree murder after declaring a mistrial when the first jury could not reach a unanimous verdict as to the lesser included offenses. Diaz asserted that the state trial court should not have granted a mistrial, as it failed to explore alternatives to, and find "manifest necessity" for, a mistrial. Diaz also asserted that the state trial court should not have retried him for first degree murder, as the first jury "implicitly acquitted" him of this charge by considering the lesser included offenses. For the reasons discussed below, we affirm.

I. Underlying Facts

Diaz was indicted for premeditated murder. At the conclusion of his jury trial on this charge, the state trial court instructed the jury:

> In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crime(s) of which he is accused, there may be evidence that he committed other acts

that would constitute a lesser included crime. Therefore, if you decide that the main accusation has not been proved beyond a reasonable doubt, you will next decide if the defendant is guilty of any lesser included crime. The lesser included crimes indicated in the definition of First Degree murder are:

(1) Second Degree Murder [and] (b) Manslaughter.

After deliberating, the jury informed the state trial court that it could not reach a unanimous verdict, as 11 jurors felt the evidence supported a second-degree murder conviction, while one juror "was holding out for manslaughter." The state trial court gave the jury an "Allen charge," and the jury continued deliberating the next day. The jury later returned, however, and informed the state trial court that it still could not reach a unanimous verdict. The jury did not explain its division, and the state trial court asked that the jury express in a note that it was deadlocked, without any indication of its division. The state trial court judge and the attorneys met in chambers. Diaz requested that the state trial court either poll the jurors on whether they had reached a verdict on the first-degree murder charge or ask that the jurors return a verdict form indicating their verdict as to its charge. The state trial court declined, in accordance with its custom to refuse to take a verdict on the greater offense when the jury is hung on the lesser included offenses, and declared a mistrial.

The state then moved to retry Diaz for first-degree murder. Diaz moved to dismiss the charge, on the ground that the jury at the first trial implicitly acquitted him of this charge. The state trial court denied the motion. At the close of the state's evidence

at the second trial, Diaz renewed his motion to dismiss on double jeopardy grounds. The state trial court denied the motion. At the close of the evidence and instructions, the jury began deliberations. At some point in the deliberations, the jury indicated that its members were split, six voting for second-degree murder verdict and six voting for a not-guilty verdict. After resuming deliberations the following day, the jury found Diaz guilty of manslaughter.

On direct appeal to the state appellate court, Diaz argued the following. The state trial court sua sponte granted a mistrial without exploring the alternatives or finding manifest necessity for a mistrial. Thus, pursuant to Supreme Court law, his retrial for first-degree murder was prohibited by the Double Jeopardy Clause. Also, the jury's indication that it was deadlocked as to the lesser included offenses, coupled with the jury's instruction not to consider the lesser included offenses unless it found that the evidence did not support a first-degree murder conviction, demonstrated that the jury "implicitly acquitted" Diaz of first-degree murder, such that he should not have been retried on this charge. The fact the he ultimately was convicted of a lesser included offense at his second trial does not render his retrial for a jeopardy-barred offense harmless, as he should not have been put through the ordeal of a second first-degree murder trial and because it could not be said that the first-degree murder charge did not influence the jury to convict him of manslaughter. Accordingly, reversal of his conviction and retrial for only manslaughter were necessary.

The state appellate court per curiam affirmed Diaz's conviction, without reasoning save citations to Mathews and Commonwealth v. Roth, 776 N.E.2d 437 (Mass. 2002), and A Juvenile v. Commonwealth, 465

N.E.2d 240 (Mass. 1984). See Diaz v. State, 844 So. 2d 655, 656 (Fla. Dist. Ct. App. 2003).

II. Facts Regarding § 2254 Petition

The district court denied Diaz's § 2254 petition, reasoning as follows. First, regarding Diaz's manifest-necessity arguments, Diaz's double jeopardy rights were not violated when the state trial court granted a mistrial and retried him for first-degree murder because the first jury was hung. In hung-jury cases, the state trial court has discretion not to explore alternatives. Also, regarding Diaz's implicit-acquittal arguments, Diaz's double jeopardy rights were not violated when he was retried for first-degree murder because the jury did not implicitly acquit him. Clearly established Supreme Court law only held that a conviction for a lesser included offense is an implied acquittal for the greater offense charged. Because the first jury did not reach a verdict, this law was inapplicable. Likewise, no clearly established federal law required the state trial court to poll the jury on its conclusion regarding first-degree murder or accept a verdict on the greater charge only. Also, while the jury's initial indication that it was deadlocked regarding the lesser included offenses may have implied that the jury no longer was considering Diaz's guilt of first-degree murder, its ultimate indication of deadlock did not provide reasoning. Finally, because the retrial did not violate Diaz's double jeopardy rights, the question of whether Diaz was prejudiced was moot.

Diaz filed a motion for a certificate of appealability ("COA"). The district court denied a COA, but we granted a COA on the limited issue of "[w]hether the appellant was 'implicitly acquitted' of first-degree murder when his first trial ended in a

mistrial because the jury was deadlocked between the lesser included offenses of second-degree murder and manslaughter and, if so, whether subsequent retrial on the charge of first-degree murder violated double jeopardy."

IV. Law

When reviewing the district court's denial of habeas petition, we review questions of law and mixed questions of law and fact de novo, and findings of fact for clear error. Nyland v. Moore, 216 F.3d 1264, 1266 (11th Cir. 2000). The scope of review is generally limited to the issues specified in the COA.. Murray v. United States, 145 F.3d 1249, 1250-51 (11th Cir. 1998).

Pursuant to § 2254,

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2). Also pursuant to § 2254, the state court's determination of any "factual issue...shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Under this standard, a state court decision is "contrary to" clearly established federal law "if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case." Putnam v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). A state court conducts an "unreasonable application" of clearly established federal law "if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case" or if it "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." Id. We have cautioned that "an 'unreasonable application' is an 'objectively unreasonable' application." Id. Indeed, the Supreme Court has instructed that the question is not whether the state "correctly" decided the issue, but whether its determination was "reasonable," even if incorrect. See Bell v. Cone, 535 U.S. 685, 694, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002).

As it applies to the § 2254 standard, "clearly established federal law" "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). When no Supreme Court precedent is on point, a state court's conclusion cannot be "contrary to clearly established Federal law

as determined by the U.S. Supreme Court." Washington v. Crosby, 324 F.3d 1263, 1265 (11th Cir. 2003).

In Green v. United States, 355 U.S. 184, 189-91, 78 S.Ct. 221, 225, 2 L.Ed.2d 199 (1957), the Supreme Court held that defendant is implicitly acquitted of a greater charge offense when a jury returns a verdict convicting him of a lesser included offense. In that case, the first jury was authorized to find the defendant guilty of either first-degree murder or the lesser included offense of second-degree murder. Id. at 189-90, 78 S.Ct. at 224-25. The jury found him guilty of second-degree murder. Id. On appeal, however, a court reversed the conviction and remanded for a new trial. Id. Accordingly, the defendant was retried for first-degree murder. Id. The Supreme Court held that this was an error, reasoning that it "believe[d] th[e] case [could] be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'" Id. at 191, 78 S.Ct. at 225.

In Price v. Georgia, 398 U.S., 323, 329, 90 S.Ct. 1757, 1761, 26 L.Ed.2d 300 (1970), the Supreme Court reiterated the rule announced in Green. In that case, the defendant was charged with first-degree murder and convicted of manslaughter, successfully appealed his manslaughter conviction, and was retried for first-degree murder and convicted again of manslaughter. Id. at 324-26, 90 S.Ct. at 1758-59. The Supreme Court held that it was an error to retry him for first-degree murder, reasoning that "this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is expressed or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a

verdict on the greater charge." Id. at 329, 90 S.Ct. at 1761. The Supreme Court also reasoned that the error was not harmless, even though the defendant ultimately was convicted again of the lesser included offense, because

> [t]he Double Jeopardy Clause ... is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.

Id. at 331-32, 90 S.Ct. at 1762.

In Mathews, 475 U.S. at 245-46, 106 S.Ct. at 1037-38, the Supreme Court held that Price "did not impose an automatic retrial rule whenever a defendant is tried for a jeopardy-barred crime and is convicted of a lesser included offense," but rather "suggest[ed] that a new trial is required only when the defendant shows a reliable inference of prejudice." In that case, the defendant pled guilty to aggravated robbery, later was charged and convicted of aggravated murder based on the same criminal act, and argued on direct appeal that the aggravated-murder charge was barred by the Double Jeopardy Clause because of the aggravated-robbery conviction. Id. at 239-44, 106 S.Ct. at 1034-37. The state appellate court agreed and reduced the defendant's conviction to one of the lesser included offense of murder. Id. The Supreme Court held that

this was not an error, rejecting the defendant's argument that he deserved a new trial for murder only. Id. at 247-48, 106 S.Ct. 1038-39. The Supreme Court reasoned that the defendant could not demonstrate that he was prejudiced by the inclusion of the aggravated-murder charge on his second verdict form, as the jury's finding that the evidence supported an aggravated-murder conviction was tantamount in finding that the evidence supported a murder conviction also. Id. at 247, 106 S.Ct. at 1038.

V. Analysis

As an initial matter, the question of whether the state trial court erred in declaring a mistrial is beyond the scope of the COA. See Murray, 145 F.3d at 1250-51. The COA asks only whether the state trial court violated the Double Jeopardy Clause by retrying Diaz for a charge of which the first jury implicitly acquitted him and, if so, whether he was prejudiced by this and merits a new trial for the lesser included offenses only. The COA does not ask whether the state trial court also violated the Double Jeopardy Clause by retrying Diaz for a charge after it failed to find a manifest necessity for declaring a mistrial regarding that charge.[1] Accordingly, the only question before us is whether Diaz was implicitly acquitted of first-degree murder and, if so, whether his retrial for this charge was prejudicial.

As it implicates this question, the state appellate

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[1] Diaz claims on appeal that the manifest-necessity issue is inextricably intertwined with the implicit-acquittal issue. However, he does not explain, and the record does not otherwise demonstrate how.

court's affirmance of Diaz's conviction was not contrary to clearly established Supreme Court law and did not involve an unreasonable application of Supreme Court law. See 28 U.S.C. § 2254(d)(1). The decision was not contrary to clear federal law because, in short, there is no Supreme Court law on point. See Washington, 324 F.3d at 1265. Both Green and Price are readily distinguishable, in that neither involved a hung jury. See Green, 355 U.S. at 189-90, 78 S.Ct. at 224-25; Price, 398 U.S. at 324-26, 90 S.Ct. at 1758-59. Indeed, the holding in Price specifically was limited to cases in which the first jury returned a verdict convicting the defendant of a lesser included offense. Price, 398 U.S. at 329, 90 S.Ct. at 1761. Because these cases stand for the proposition that a conviction for a lesser included offense also is an implied acquittal of the greater charged offense, they were not binding on the state trial court, as the first jury reached no verdict. See Green, 355 U.S. at 189-90, 78 S.Ct. at 224-25; Price, 398 U.S. at 324-26, 90 S.Ct. at 1758-59. Also, Mathews was not binding on the state trial court's decision of whether the retrial for first-degree murder was jeopardy-barred, as this point was conceded in Mathews. See Mathews, 475 U.S. at 239-44, 106 S.Ct. at 1034-37.

The decision was not an unreasonable clear application of clear federal law because the state appellate court did not unreasonably refuse to extend the principles of Green and Price to the facts at hand. See Putman, 268 F.3d at 1241. The record establishes that the jury originally indicated that it was deadlocked as to the lesser included offenses. Given the jury instructions that, upon deciding that first-degree murder was not provided beyond a reasonable doubt, it should consider the lesser included offenses, the jury thereby arguably indicated that, at least at

that point, it did not think Diaz should be convicted of first-degree murder. However, the jury then was given an Allen charge and continued to deliberate the following day. When the jury later indicated that it remained deadlocked, no explanation was requested or provided. Thus, it is not clear that the jury, at this point also, did not think Diaz should be convicted of first-degree murder. It is possible that the jury concluded that first-degree murder was not proven and began to discuss the lesser included offenses on the first day of deliberations. Thus, the facts did not demonstrate an implicit acquittal sufficiently enough to call for an extension of established law. See Putman, 268 F. 3d at 1241.

Accordingly, because the state appellate court's affirmance of Diaz's conviction after his retrial for first-degree murder was not contrary to, or an unreasonable application of, Supreme Court precedent, we affirm the denial of Diaz's § 2254 petition. See 28 U.S.C. § 2254(d)(1) and (2).

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-20724-CIV-LENARD/SIMONTON

LEONARDO DIAZ,

Petitioner,

v.

JAMES CROSBY, JR.,

Respondent.

_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATIONS (D.E. 14) AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE is before the Court on the Report of Magistrate Judge Andrea M. Simonton ("Report," D.E. 23), issued on May 26, 2006. Petitioner Leonardo Diaz ("Diaz" or "Petitioner") filed his Objections ("Objections," D.E. 24) on June 1, 2006. After a de novo review of the Report, the Objections, and the record, the Court finds as follows:

I. Factual and Procedural Background

On February 8, 1999, Leonardo Diaz was involved in a fight with a high school classmate, during which Diaz fatally shot the classmate. (D.E. 11, Appendix VII, at 26). The first trial took place in the

Circuit Court of the 11th Circuit of Florida in and for Miami-Dade County between October 16, 2000 and October 23, 2000. (Report at 2.) The charges submitted to the jury were for the offense of first-degree murder and the lesser included offenses of second-degree murder and manslaughter. (Id.) The jury was also instructed on the verdict form to select if the charges were committed "with" or "without" a firearm. (Id.) After deliberating, the jury notified the court that they were divided between the two lesser offenses. (Id. at 3). The court then gave the jury an Allen charge and they continued deliberating. (Id.) Following further deliberations, the jury sent a note to the court indicating that they were deadlocked. (Id.) Defense counsel then requested the court to either poll the jurors on the issue of whether they had reached a verdict on the first-degree murder charge or send a verdict form that would allow the jury to reach a verdict only on the first-degree murder charge. (Id.) The court declined both requests and declared a mistrial. (Id. at 4.) In January 2001, Diaz filed a motion to dismiss the charge of first-degree murder, claiming that the jury had acquitted him of first-degree murder and that he should not be subject to further prosecution on that charge. (Id.) After hearing arguments from both Diaz and the state, the motion was denied on February 20, 2001. (Id. at 5.)

The second trial on the same charges began in state court on February 21, 2001. (Id.) On February 27, 2001, the jury reached a verdict and Diaz was found guilty of the lesser included offenses of manslaughter with a firearm and carrying a concealed firearm. (Id.) Diaz appealed his conviction, arguing that the re-trial with the higher offense of first-degree murder violated his double jeopardy rights. (Id. at 6). The Third District Court of Appeals affirmed. (Id.)

Diaz moved for a rehearing en banc and/or certification for review by the Florida Supreme Court. (Id.) The Third District Court of Appeals denied the motion. (Id.) Diaz then sought review by the Florida Supreme Court. (Id.) On June 23, 2003, the court dismissed the petition for review on the grounds that it lacked jurisdiction. (Id.)

II. Report of the Magistrate Judge

In her Report, the Magistrate Judge examined Petitioner's lone claim of double jeopardy and concluded that it did not warrant habeas relief. (Report at 6.) The Magistrate Judge first examined the Supreme Court case of United States v. Perez, 22 U.S. 579 (1824), where the manifest necessity standard was established, to determine whether a re-trial would violate a defendant's rights against double jeopardy. (Report at 9.) The Magistrate Judge stated that on one end of the spectrum, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence or when there is reason to believe that the prosecutor is using resources to harass or achieve a tactical advantage over the accused. (Id. at 9-10). On the other end of the spectrum is the classic basis for a proper mistrial, when the jury is hung (Id. at 10), in which the trial court's decision is accorded great deference.

The Magistrate Judge also reviewed United States v. Jorn, 400 U.S. 470 (1971), where the trial court declared a mistrial, not because the jury was hung, but to protect the prosecution witnesses. (Report at 10.) The Supreme Court found that based on the facts of the case, the trial court abused its discretion because there was no manifest necessity for declaring a mistrial. (Id.) In Jorn, although the prosecution and

the witnesses assured the trial court that they had been warned of their constitutional rights, the court nevertheless declared a mistrial because it feared that the prosecution did not adequately explain to the witnesses their constitutional rights. (Id.) The Magistrate Judge noted that the Supreme Court distinguished the facts in Jorn from cases in which the jury is unable to reach a verdict. (Id.)

The Magistrate Judge next discussed Price v. Georgia, 398 U.S. 323, 330 (1970), in which the Supreme Court found that if a jury returns a verdict on a lesser included offense, it has implicitly acquitted the defendant of the greater offense. (Report at 11.) The Supreme Court therefore held that it was a violation of the double jeopardy clause to retry the defendant for the greater offense after his conviction for the lesser offense was reversed on appeal. (Id.)

After reviewing the relevant case law, Magistrate Judge Simonton found that the Supreme Court had never addressed the issue presented in the case at bar, which is whether a trial court is required to take a partial verdict on a greater offense where the jury is unable to reach unanimous agreement as to any lesser included offense. (Id.) However, Magistrate Judge Simonton found that there were many state and lower federal courts which had addressed this issue, and the results were divided. (Id.) The Magistrate Judge held that under 28 U.S.C. § 2254(d), Petitioner failed to meet his burden and prove that the trial court violated clearly established constitutional or federal law requiring the court to either poll the jury or accept a partial verdict as to the greater offense when the jury is deadlocked between two lesser offenses. (Report at 14.) The Magistrate Judge also found that the state court did not unreasonably apply clearly established federal law when it declared a mistrial for all of Diaz's

charged offenses. (Id.)

In support, the Magistrate Judge cited two cases from the Massachusetts Supreme Court, A Juvenile v. Commonwealth, 465 N.E.2d 240 (Mass. 1984) and Commonwealth v. Roth, 776 N.E.2d 437 (Mass. 2002), which held that a trial court was under no duty to accept a partial verdict, or to inquire as to the jury's opinion on lesser included charges. (Report at 12.) The Magistrate Judge found that Diaz had failed to cite any binding case authority which required a trial court to attempt to take such a verdict. (Id. at 15.)

The Magistrate Judge also found that Price only addressed the case in which a jury is able to unanimously agree with respect to a lesser included offense. (Id. at 14.) Judge Simonton held that, while in that case there would be an implicit acquittal with respect to the greater offense, that did not establish a right to jury consideration of a partial verdict where unanimity was not reached. (Id.) The Magistrate Judge found that while the Massachusetts courts' decisions were not binding, they were highly persuasive. (Id.) Moreover, the Magistrate Judge held that even if Diaz was able to establish that his double jeopardy rights were violated, he would not be entitled to relief because Diaz asserts that the charged offense of first-degree murder was jeopardy-barred, and not the offense of second-degree murder or the offense of manslaughter, of which he was convicted. (Id. at 15.) Magistrate Judge Simonton found that the Supreme Court case of Morris v. Mathews, 475 U.S. 237 (1986), places the burden on the petitioner to prove that there is a reasonable probability that he would not have been convicted of the non-jeopardy barred offense absent the inclusion of the alleged jeopardy-barred offense. (Report at 16.) Therefore, the Magistrate Judge concluded that Diaz was not entitled to relief because

he was unable to show that the higher included offense charges were inappropriately included in his second trial and that the outcome of the jury's verdict would have been different absent the presence of those charges.

III. Petitioner's Objections

Petitioner Diaz moves to vacate the judgment and sentence of the court on the ground that the court's decision to declare a mistrial on all charges was contrary to or an unreasonable application of clearly established Federal law. (Objections at 1 (citing 28 U.S. C. § 2254(d)(1)).) Diaz argues that he does meet the standards of the Anti-terrorism and Effective Death Penalty Act ("AEDPA") for habeas corpus relief, in the form of a new trial, because the state trial court's decision to grant a mistrial was an unreasonable application of the Supreme Court's manifest necessity standard. (Objections at 11.) Diaz first asserts that the trial court violated his rights guaranteed by the Double Jeopardy Clauses of the Constitution of the United States (Amendment V) when he was twice placed in jeopardy for the same offense. (Id. at 12.) Diaz argues that under Arizona v. Washington, 434 U.S. 497, 503 (1978), the prosecution must show a manifest necessity for any mistrial declared over the objection of the defendant with a heavy burden of proof. (Objections at 13.) Diaz further contends that unless there is manifest necessity for declaring a mistrial without the defendant's consent, a retrial is barred under the Double Jeopardy Clause. (Id.) Diaz states that manifest necessity for declaring a mistrial without the defendant's concurrence may be demonstrated only if the trial court has considered and rejected all possible alternatives. (Id.) Diaz cites

Downum v. United States, 372 U.S. 734 (1963) to show that determination of whether a charge is jeopardy barred must be viewed in a light most favorable to the defendant. (Objections at 13-14).

Diaz then maintains that the state trial court did not consider any alternatives requested by Petitioner, which included polling the jury on their verdict for the charge of first-degree murder. (Id. at 14.) Diaz claims that the state trial judge's refusal to consider the alternatives was unconstitutional, especially since the jury was deadlocked on the lesser included offenses, which implied that the jury acquitted Petitioner of the higher offense of first-degree murder. (Id.) He contends that when the court declared a mistrial, Petitioner was denied his right to receive a verdict on the highest charge of first-degree murder. (Id.)

Diaz next argues that although the jury in the second trial rendered a verdict of guilty on the lesser included offense of manslaughter, the submission of the first-degree murder charge was unconstitutional and cannot be considered a harmless submission to the jury, since it was a jeopardy-barred greater offense. (Id.) Diaz relies on Price to show that a jury submission of a jeopardy-barred offense cannot be rendered harmless, even if a jury reaches a verdict of a lesser offense, because it cannot be determined whether the inclusion of a higher offense induced the jury to find the defendant guilty of a less serious offense. (Id.) As the Supreme Court in Price vacated the defendant's conviction where the jeopardy-barred offense was included and ordered a retrial on only the defendant's lesser offense, Diaz argues that the same relief should be afforded to him. (Id. at 14-15). Diaz claims that the Magistrate Judge has failed to realize that Petitioner had been implicitly acquitted of first-

degree murder when the jury was deadlocked considering the lesser included offense, since the jury was only to deliberate on the lesser included offenses if they had a reasonable doubt as to the first-degree murder charge. (Id.) Thus, Diaz argues that he is able to show prejudice by the inclusion of the first-degree murder offense at the second trial, as he may have possibly been found not guilty if that charge had not been submitted to the jury. (Id. at 16.)

In response to the Magistrate Judge, Diaz asserts that the Supreme Court's decision in Mathews is distinguishable from the instant case. (Id.) Diaz argues that the "presumption of prejudice" from Price did not apply in Mathews, because the defendant in Mathews was convicted of the greater offense of aggravated murder and found guilty of the lesser includes charges, as well. (Id.) Diaz further argues that Mathews does not apply to his case and that the presumption of prejudice in Price does apply because Diaz was only found guilty of the lesser included offense, and not the greater offense. (Id.)

IV. Analysis

A. Petitions for Writ of Habeas Corpus

Section 104(d) of the AEDPA strictly limits the ability of a federal court to grant habeas corpus relief. This subsection provides that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the claim --

(1) resulted in a decision that was contrary to, or involved the unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d). The United States Supreme Court has explained these standards as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if he state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (1999). "Clearly established federal law" refers to the holdings of the United States Supreme Court as of the time of the relevant state court decision. Putnam v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001).

Under federal habeas corpus review, a state

court's factual findings are presumed to be correct unless the petitioner "rebuts the presumption of correctness by clear and convincing evidence." Miller-El v. Dretke, 545 U.S. 231, 240 (2005) (citing 28 U.S. C. § 2254(e)(1)); accord Marshall v. Loneberger, 459 U.S. 422, 432 (1983). The standard of rebuttal by clear and convincing evidence is "demanding but not insatiable." Miller-El, 545 U.S. at 240.

B. Standard of Review for Double Jeopardy Claims

The Supreme Court observed that, "[t]he Constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy." Price, 398 U.S. at 327. Further, to succeed on a double jeopardy claim in the event of a prior mistrial, a petitioner must analyze his case under the manifest necessity standard. Perez, 22 U.S. at 580. Pursuant to Perez, courts have the authority to declare a mistrial whenever they believe, after taking all circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. Id. In Arizona v. Washington, the Supreme Court provided a guideline for determining whether there is manifest necessity for declaring a mistrial. 434 U.S. at 499. A stringent application for the manifest necessity standard should be used when declaring a mistrial in cases with insufficient evidence and/or where the prosecution is using inappropriate tactics in the trial. Id. A less stringent application can be used in cases where a jury is deadlocked, which is the standard instance in which a mistrial is

appropriate. Id.

C. Petitioner's Double Jeopardy Claim

Petitioner's sole claim is that his convictions were obtained in violation of the Constitutional protection against double jeopardy. In support, Diaz first argues that the trial had no manifest necessity to declare a mistrial, and that the court was unjust in its refusal to consider any alternatives to a mistrial. (Objections at 14.) Diaz cites Perez for the proposition that manifest necessity for declaring a mistrial without the defendant's approval can only be found if the trial court considered and rejected all other possible alternatives. (Id. at 13.) Diaz also cites Downum to show that if there is a question of whether an offense is jeopardy-barred, it should be viewed in a light most favorable to the defendant. (Id. at 13-14.)

However, in Perez, the Supreme Court also holds that a person's double jeopardy rights are not violated, and a subsequent trial for the same offense is not barred, when the jury is discharged because it could not reach an agreement. 22 U.S. at 580. Indeed, the Court has long held that "the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." Allen v. United States, 164 U.S. 492, 502 (1896). Although a court may be required to have manifest necessity when declaring a mistrial, a deadlocked jury, as occurred here, is still a standard and accepted justification for the decision to declare a mistrial and retry a case with the same offenses, a decision to which great deference is afforded. The Supreme Court has further held that there will be diverse opinions on this discretionary power of the courts, and that "such a discharge constitutes no bar to

further proceedings, and gives no right of exemption to the prisoner from being again put on trial." Id. Therefore, this Court concludes that the trial court was not required to consider and reject alternative approaches when confronted with a deadlocked jury, as it is a discretionary decision of courts whether to consider alternatives prior to declaring a mistrial.

Diaz also cites Price for the proposition that it is a violation of the defendant's rights against double jeopardy to retry him for the higher offense after appeal when he was only found guilty of the lesser included offense in his first trial. (Objections at 15.) However, that was not the case here. While the defendant in Price was implicitly acquitted of the higher offense of murder when the first jury reached the unanimous decision to convict him of the lesser offense of manslaughter, Price, 398 U.S. at 325, Petitioner's first trial involved a jury that was unable to reach any unanimous agreement. Although the jury in Petitioner's first trial indicated it was deadlocked between the lesser included offenses, which may have implied that they were no longer considering the defendant's guilt on the higher offense of first-degree murder, no verdict was returned by the jury on any charge and, furthermore, the court was not required by any constitutional or federal law to poll the jury on that higher offense. Therefore, the Court finds that were was no implicit acquittal at the first trial of Petitioner. Green v. United States, 355 U.S. 184, 192 (1957) (finding that jury's verdict of guilty on lesser included offense of murder in the second degree "can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'").

Next, Diaz claims that the inclusion of the higher included offense in his second trial should not be considered harmless error solely because the jury convicted Petitioner of the lesser included offense. (Objections at 14.) Diaz cites Price, in which the Supreme Court held that the retrial including the jeopardy-barred offense was not harmless error because it could not be determined whether the inclusion of a higher offense affected the jury's deliberation and verdict when determining whether or not the defendant was guilty of a higher offense, a less serious offense, or innocent of all charges. Price, 398 U.S. at 327. Diaz argues that he meets the burden of showing prejudice required by Mathews by the inclusion of the higher offense at his second trial after the jurors were deadlocked on the less serious offenses in his first trial. (Objections at 14.)

However, this Court finds that prejudice was shown in Price because the jury had reached a unanimous verdict in the first case on the higher offenses, and therefore it was a violation of that plaintiff's double jeopardy rights to include the jeopardy-barred offense in the second trial. No prejudice can be shown, however, where, as here, the jury never delivered a unanimous verdict on any charge. Moreover, regardless of whether Diaz would be able to establish a presumption of prejudice by the inclusion of an alleged jeopardy-barred offense, there is no law to show that any charges in Petitioner's second case were, in fact, jeopardy-barred.

Furthermore, this Court finds that the facts in Mathews are distinguishable from the case at hand. In Mathews, the Ohio Court of Appeals reduced the petitioner's jeopardy-barred conviction to a lesser included non-jeopardy barred offense instead of granting a new trial. The Supreme Court held that the

burden is on the petitioner to show that he would not have been convicted of the non-jeopardy barred offense absent the presence of the jeopardy-barred offense. Here, Diaz does contend that the submission of an alleged jeopardy-barred charge affected the jury's deliberation on the lesser included offense. However, in Mathews the Supreme Court already found that the higher offense was jeopardy-barred and the only issue was whether the reduction to the lesser included offense was just, or if a new trial should have been granted. In Diaz's case, the issue of whether the higher included offense was jeopardy-barred must be addressed first, prior to the secondary issue of whether the inclusion of a jeopardy-barred offense was detrimental to the outcome of the trial. Because the Court does not find that Petitioner's higher included offense was jeopardy barred after his first trial, the inclusion of such offense in Diaz's second trial could not have constituted constitutional error. Further, Petitioner is unable to show through federal law or Supreme Court case law that the court was required to poll the jury on the higher offense of first-degree murder prior to declaring a mistrial. The Court therefore concludes that Petitioner's claim does not warrant habeas relief.

The Court has not thoroughly considered Petitioner's claim, the Objections raised by Petitioner, and the record in this action. After this careful review, the Court finds that, given the absence of any unreasonable application of clearly established federal law and of any unreasonable determination of the facts in light of the evidence presented in the state court proceedings, see 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 379-390 (1999), no habeas relief is warranted here, and it is:

ORDERED AND ADJUDGED that;

1. The Report of the Magistrate Judge (D.E. 14), issued on May 26, 2006, is **ADOPTED**.
2. Petitioner Diaz's Petition under 28 U.S.C. § 2254(D.E. 1), filed on or about March 26, 2004, is **DENIED**.
3. All pending motions not otherwise ruled upon are **DENIED as moot**.
4. This case is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 16th day of July, 2007.

JOAN A. LENARD
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

LEONARDO DIAZ,

Petitioner,

v.

JAMES CROSBY,
Florida Department of Corrections,
CHARLIE CRIST,
Attorney General of the State of Florida,

Respondents.
_____/

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, LEONARDO DIAZ [petitioner], through undersigned counsel, respectfully files this memorandum of law in support of his petition for writ of habeas corpus.

An appendix (Volumes I through VIII) accompanies this memorandum. References are to the volume number followed by the page number.

A.

SUMMARY OF THE DOUBLE JEOPARDY CLAIM

The petitioner was a 16-year old high school student whose life was threatened by a school bully. The petitioner was so traumatized that he avoided attending school. When he was forced to return to school, he carried a gun. When he was attacked by the bully, he fired one shot which resulted in the victim's death. The State of Florida charged the petitioner as an adult and indicted him for first degree murder.

At the ensuing jury trial, the petitioner claimed self-defense. At the close of all of the evidence, the jury was instructed not to consider the lesser included offenses of second degree murder or manslaughter unless there was reasonable doubt as to the charge of first degree murder.

Following deliberations, the jurors announced they were deadlocked between second degree murder and manslaughter. In view of the jury instruction that the jurors were not to consider those lesser included offenses unless they had reasonable doubt as to the charge of first degree murder, the petitioner requested that the trial judge either receive a verdict on the first degree murder charge or inquire whether the jury had acquitted the petitioner of first degree murder. The trial judge refused. Instead, the trial judge *sua sponte* declared a mistrial on the charge of first degree murder. The cause was set for retrial on the charge of first degree murder.

The petitioner moved to dismiss the first degree murder charge on double jeopardy grounds. The petitioner relied upon the well-settled precedents of the Supreme Court of the United States in *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971) (where a judge declares *sua sponte* a mistrial on a charge where all possible alternatives were not considered, employed and found wanting, retrial on that charge is barred by the Double Jeopardy Clause) and its

progeny. The motion was denied.

The case was tried to the second jury on the charge of first degree murder. The same instruction was given regarding the lesser included offenses. Following extensive deliberations, the jurors announced they were agreed on the charge of carrying a concealed weapon but deadlocked as follows: six voting guilty of second degree murder, and six voting not guilty. After a recess and further deliberations, the jury returned an apparent compromise verdict finding the petitioner guilty of manslaughter with a firearm and carrying a concealed firearm. The state trial judge sentenced the petitioner to a term of imprisonment of 30 years.

The petitioner presented his double jeopardy claim on direct appeal to the District Court of Appeal of Florida, Third District. In addition to *Jorn* and its Supreme Court progeny, the petitioner relied upon *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) which held that the unconstitutional submission of a greater charge to a jury is not harmless beyond a reasonable doubt simply because the jury convicts upon a lesser, but properly submitted, charge. The appellate court affirmed. The petitioner thereafter unsuccessfully sought review of the federal claim in the Supreme Court of Florida.

The petitioner's double jeopardy rights were violated when the trial judge *sua sponte* declared a mistrial on the charge of first degree murder over the petitioner's objection. A judge is prohibited from declaring *sua sponte* a mistrial unless a "scrupulous exercise of judicial discretion" compels the conclusion that no worthwhile purpose would be served by any alternative to mistrial. *Jorn*, 400 U.S. at 485, 91 S.Ct. at 557. Unless there is a "manifest necessity" for declaring a mistrial without a defendant's consent, retrial is barred under the Double Jeopardy Clause.

United States v. Perez, 22 U.S. (9 Wheat). 579, 6 L.Ed. 165 (1824). Because there was a clear alternative to mistrial that the trial judge refused to undertake, retrial on the charge of first degree murder was jeopardy-barred. *Jorn*; *Perez*. The submission of the charge of first degree murder to the jury at the second trial was unconstitutional and not subject to harmless error analysis. *Price, supra*.

The petitioner is entitled to be tried without the charge of first degree murder. The State of Florida can choose to retry the petitioner upon a charge no greater than manslaughter (because the jury found him guilty of that charge thereby acquitting him of all higher charges).

The state court proceedings are directly contrary to controlling precedents of the Supreme Court of the United States. Accordingly, the petitioner is entitled to habeas corpus relief in the form of a new trial.

B.

STATEMENT OF THE CASE AND FACTS

Introduction

The petitioner, a 16-year old high school student, learned that a bully in the school, David Matallana, known to everyone as "Biggie," planned to attack and beat him in retaliation for a comment he made to a female student. Biggie was a member of a group known as the Squad. The female student was the girlfriend of a Squad member. The petitioner unsuccessfully tried to avoid the confrontation. He carried a pistol to school in anticipation of the attack. When the confrontation took place, the petitioner fired one shot which struck and

killed Biggie. The petitioner was charged with premeditated first degree murder and carrying a concealed firearm. (VIII: 1-3). The petitioner claimed self defense based upon physical evidence and eyewitness testimony that the one shot was fired only when, during the confrontation, Biggie was about to hurl a rock at the petitioner. The State of Florida tried the petitioner as an adult.

After the parties rested, the jury was instructed that "if you decide that the main accusation has not been proved beyond a reasonable doubt, you will next need to decide if the defendant is guilty of any lesser included crime. The lesser included crimes indicated in the definition of first degree murder are (a) second degree murder, (b) manslaughter. " (VIII:4) . The verdict forms offered the jury four choices as to the murder charge as follows: guilty of first degree murder as charged, guilty of second degree murder as a lesser included offense, guilty of manslaughter as a lesser included offense, or not guilty. (VIII:26).

Following deliberations, the jury announced that it was divided as follows: eleven jurors voting guilty as to second degree murder; and one juror voting guilty as to manslaughter. (VIII:23). After further deliberations, the jury advised that it still could not reach a unanimous decision. The petitioner requested that the jury be polled as to a verdict on first degree murder or that a verdict be received as to first degree murder. After the judge denied both requests (pursuant to his standard policy of refusing to take a verdict on the most serious charge when the jury is hung on lesser included offenses), the judge *sua sponte* declared a mistrial. (VIII:5-8, 20-21).

The State noticed the cause for retrial on the charge of first degree murder. The petitioner moved to dismiss the charge of first degree murder on double

jeopardy grounds. (VIII:9-10, 22-24). The motion to dismiss was denied (VIII:11) and the cause proceeded to retrial on the charge of first degree murder. The witnesses were the same at both trials.

The Evidence at the Retrial

At the time of the shooting, the petitioner was 16 years of age and attending high school. When he walked into class one day, another student, Eileen Ramos, cursed at him, although he had not said a word to her. Ramos walked away and left behind her books and a diary. The petitioner and two other boys looked through the diary and learned that Ramos had been raped a year earlier. The petitioner asked her how it felt to be raped. She was upset by the remark and left. Ramos' boyfriend, Walter Sanchez, learned about the remark. David Matallana, whom the students called "Biggie" because he was six feet tall and weighed 200 pounds, even though he was only in tenth grade, also heard about the petitioner's remark. (II:86-96, 115-116; III:80, 147). The petitioner is five feet six inches tall. (II:142). Biggie and Sanchez told Ramos that they would "take care of " the petitioner because of the comment he made to Ramos. (II:93, 96). Sanchez also told one of his best friends, Odilio Olazabal, that he was going to fight the petitioner. (II:103, 115). Biggie and Olazabal were both members of the Squad. Biggie's role in the Squad was to "watch their backs" and "back them up." (II:143-144).

Approximately one week later, Biggie directed Camilo Gonzalez, also a Squad member, to follow the petitioner. Gonzalez followed the petitioner to a public telephone. While the petitioner was talking on the telephone, Biggie appeared and told the petitioner that it was time to fight. The petitioner said that he did not

want to fight, did not want to get into trouble, and wanted to be left alone. Biggie responded by pushing the petitioner and hanging up the telephone twice while the petitioner was talking. Biggie continued intimidating the petitioner for the next five minutes until the petitioner said he would meet Biggie behind a supermarket. On the day designated, Biggie, accompanied by Olazabal and Gonzalez, went to the supermarket where the fight would take place. The petitioner did not show up. Out of fear, he had stayed home from school for three days. (II:97-98, 105, 117-118, 131-132, 144-151; III:166, 181-182).

Maria Diaz, the defendant's mother, testified that she was a teacher for 14 years in elementary school. She studied at the University of Miami and earned a Master's degree in elementary education at Nova University. (III:179). Mrs. Diaz testified that she knew her son was not ill when he was staying home, but that something was wrong because he acted afraid. During his days at home from school, the petitioner would uncharacteristically approach his mother and tell her that he loved her. The petitioner's parents, unaware that the threats from Biggie and the Squad were the cause of the petitioner's fears, insisted the petitioner return to classes. The petitioner reluctantly returned to school, never revealing to his parents what he was facing from Biggie and the Squad. (III:181-182).

Sanchez testified that he witnessed the incident at the public telephones when Biggie pushed the petitioner and hung up the telephone twice while the petitioner was talking. (III:166). On the day of the shooting, Sanchez heard Biggie say that when he caught up with the petitioner, he would "beat him down." (III:167). Sanchez also heard Biggie state that he was going to knock the petitioner out "real quick." When Biggie said this, he was pounding one hand

against the other. (III:168).

Cindy Puleto also witnessed the telephone confrontation. She testified that Biggie approached the petitioner very roughly and in a fighting attitude and that the petitioner wanted nothing to do with Biggie and tried to walk away. But Biggie took the telephone from the petitioner and hung up the receiver several times. The petitioner tried to ignore Biggie. But Biggie pushed the petitioner and turned him around by the shoulder. Biggie removed his jacket and said that he would not leave the petitioner alone until they fought. (III:172-173).

Luis Puerta, a student at the school and close friend of Biggie, testified that Biggie stated that he was going to get in a fight with a little guy and "beat his ass." (III:157-158).

On the day of the fight, Gonzalez's brother, Juan, and two other students (Christopher Tolemota and one Luis), were being teased by others on the school bus. Biggie, Gonzalez, and Olazabal went to the bus stop to "take care of the problem" but the students causing the problem were not on the bus. (II:107-108, 119-124, 156). The petitioner and Biggie were at the bus stop. Gonzalez claimed that it was the petitioner who asked Biggie to fight and that the two then went to the rear of the supermarket. Gonzalez and Olazabal went to the bus to check on Gonzalez's brother when they heard the gunshot. When they arrived on the scene, Biggie was shot. They observed rocks at the scene which was a construction site. Olazabal ran back to school for help. (II:110, 114, 126, 135, 138, 159-160).

Avianon Romanan testified on direct examination by defense counsel that he was on a school bus when he witnessed the fight and the shooting. At the time, he did not know either the petitioner or Biggie. Romanan watched as the two boys threw punches at each other

for approximately ten seconds. Biggie pushed the petitioner away and picked up a rock. Romanan then observed a gun in the petitioner's hand and heard the gunshot. (III:186-189, 204-205). Although on cross-examination, the prosecutor attacked Romanan's claims as to whether his observations were accurate (III:190-203), a detective who interviewed Romanan shortly after the shooting testified that Romanan told him that Biggie picked up a rock just prior to the shooting. (IV:6).

The medical examiner testified that Biggie was six feet tall and weighed 198 pounds. The cause of death was a single gunshot wound. The path of the bullet was left to right and front to back and downward. The bullet's trajectory was consistent with Biggie being lower than the firearm and bending down to pick up and throw something when he was shot. (II:38; III:85).

Gladys Gillmore testified that she was driving one of the high school's buses when she saw the petitioner and Biggie during the confrontation. (III:3-9). Gillmore was "not concentrating on them. I had students on my bus, and I am trying to concentrate on the safety of my bus." (III:9). Gillmore did not observe anything in Biggie's hands or see him pick up the rock at the time the shot was fired. (III:9). Gillmore did not report the shooting to the police, school authorities, or anyone else. (III:15-17). In fact, she did not discuss the shooting until police approached her a week later. (III:16).

Immediately after the incident, the petitioner was stopped by police near the scene. (III:40-41). There were scratches on his chest and rocks were observed within 10 feet of the deceased. (III:66-67). The petitioner was in police custody from late afternoon until nearly 3:00 a.m. at which time he was interrogated and gave the following statement. One day in class, his friend and classmate, Eileen Ramos, was

very rude and cursed at him for no apparent reason. She left behind her diary. The petitioner looked at the diary and learned she had been raped. He wanted to anger her so he asked her how it felt to be raped. Biggie and Sanchez wanted to fight the petitioner over his comment to Ramos. Sanchez said that he would return with "his Squad." The petitioner did not want to get into trouble so he stayed home from school. On Saturday, the petitioner told his girlfriend about the threats. She said she did not want him to die. He said he was thinking about buying a gun. He had been offered a gun months ago by a student but said he had no use for one. The girlfriend said it was a good idea, that the petitioner had been in private school until recently, and she knew from being in public school that many students carry guns for protection. The petitioner contacted the student who sold him the gun on Sunday. On Monday, the petitioner was convinced that Biggie would attack him. He began feeling sick and could not get to school on time. He made it to school that afternoon and carried the gun in his pants pocket. As feared, Biggie confronted him. They went to the rear of the supermarket. After Biggie wrapped a T-shirt around his hand, he punched the petitioner to the ground. As the petitioner recovered, Biggie reached into his pocket. The petitioner walked backwards and drew the gun from his pocket. The petitioner pointed the gun at Biggie and told him to "chill" but Biggie continued toward the petitioner who then fired the one shot that struck Biggie. (III:94, 101-108, 125, 132-133, 146-152).

After the State rested, the petitioner renewed his double jeopardy claim which the trial court denied. (VIII:12).

The Jury Deadlock as to the Lesser Included Offenses

As in the first trial, the jury was instructed not to consider the lesser included offenses of second degree murder and manslaughter unless there was reasonable doubt as to the charge of first degree murder. (IV:48-499). After extensive deliberations, the jurors indicated on a Friday they were agreed on the charge of carrying a concealed weapon but deadlocked as follows: six voting guilty of second degree murder, and six voting not guilty. (VIII:13; IV:61-62). The judge recessed the jury for the weekend. (IV:63-64). After further deliberations, the jury returned a verdict finding the petitioner guilty of manslaughter with a firearm and carrying a concealed firearm. (VIII:14).

Sentencing

The petitioner was sentenced to imprisonment for 30 years for manslaughter, and a concurrent term of five years for carrying a concealed firearm. (VIII:15-19)

C.

EXHAUSTION OF THE DOUBLE JEOPARDY CLAIM

On direct appeal to the District Court of Appeal of Florida, Third District, the petitioner argued that his retrial on the first-degree murder charge violated his rights under the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. (VIII:27-65). The petitioner also expressly relied upon the rule of the Supreme Court that the fact that the

jury did not convict him of first degree murder did not mean that the verdict on the lesser offense of manslaughter could stand. See *Price v. Georgia, supra.* The Third District entered a per curiam affirmance without opinion (VIII:119-120) which cited *Morris v. Matthews*, 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) (a decision not relied upon by the State in its brief). The affirmance is reported as *Diaz v. State*, 844 So. 2d 655 (Fla.3d DCA 2003).

The petitioner sought review of his federal double jeopardy claim in the Supreme Court of Florida. (VIII:131-143). Review was denied on June 23, 2003. (VIII:154). The denial is reported as *Diaz v. State*, 848 So. 2d 1154 (Fla.2003).

D.

ARGUMENT

(1)

The Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] provides in pertinent part that a state prisoner is entitled to federal habeas corpus relief upon a showing that the state's adjudication of his federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ...". 28 U.S.C. § 2254(d)(1). A decision is "contrary to" federal law if the state court proceedings result in the application of a legal principle different from the governing principle set forth in Supreme Court cases, or if the state court decides the case differently from a Supreme Court case upon materially indistinguishable facts. *Bell v. Cone*, 535

U.S. 685, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002). See also *Williams v. Taylor*, 529 U.S. 362, 405-406, 120 S.Ct. 1495, 146 L.Ed.2d 390 (2000) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases..."); *Hart v. Attorney General of the State of Florida*, 323 F.3d 884 (11th Cir.2003) (applying *Williams v. Taylor* and finding that the Florida state court decisions in that case were contrary to clearly established Supreme Court precedent).

As shown below, well-settled legal principles established by Supreme Court cases required the state trial judge to address the alternatives to mistrial. Once the state trial judge declared the mistrial on the charge of first degree murder in violation of those principles, the defendant was unconstitutionally retried on that charge. Thereafter, additionally well-settled Supreme Court precedent required a new trial despite the petitioner's conviction of a lesser included offense and without regard to the harmless error doctrine.

Thus, the petitioner meets the standards of the AEDPA for habeas corpus relief in the form of a new trial because the state trial court's decision to grant a mistrial was an unreasonable application of the Supreme Court's manifest necessity standards and because the state appellate court's failure to reverse was directly contrary to the decision of the Supreme Court of the United States in *Price*.

(2)

The protection of an accused against being twice placed in jeopardy for the same offense is guaranteed by the Double Jeopardy Clauses of the Constitution of the United States. See U.S. Const. amend V. The Double

Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." *Id.* The Clause applies to the States via the Fourteenth Amendment. See *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The Clause protects not only the right of a defendant against retrial after an acquittal and against multiple punishments for the same offense, but also a "defendant's valued right to have his trial completed by a particular tribunal." *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 829, 54 L.Ed.2d 717 (1978), (quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1940)).

When a jury is truly deadlocked, the trial court may declare a mistrial without violating the defendant's double jeopardy protections. In the case of a true deadlock, the defendant's "valued right" to have a particular jury decide his fate becomes "subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v Washington*, 434 U.S. at 505, 98 S.Ct. 824.

However, because of the countervailing constitutional right of the defendant, the prosecution "must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant," and the burden "is a heavy one." *Id.* A mistrial should not be declared *sua sponte* or upon the request of the prosecution except "under urgent circumstances and for very plain and obvious causes." *United States v. Perez*, 22 U.S. (9 Wheat.) 579,580, 6 L.Ed. 165 (1824); *accord Washington*, 434 U.S. at 506 n. 18, 98 S.Ct. 824.

Accordingly, a judge is prohibited from declaring *sua sponte* a mistrial unless a "scrupulous exercise of judicial discretion" compels the conclusion that no worthwhile purpose would be served by an alternative

to mistrial. *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971). Unless there is a manifest necessity for declaring a mistrial without the defendant's consent, a retrial is barred under the Double Jeopardy Clause. *Perez*, *supra*. "Manifest necessity for declaring a mistrial without the defendant's concurrence may be demonstrated only if the trial court has considered and rejected all possible alternatives." *Id.* Any doubts about whether an offense is jeopardy-barred must be resolved "in favor of the liberty of the citizen". *Downum v. United States*, 372 U.S. 734, 738, 83 S.Ct. 1033, 1036, 10 L.Ed.2d 100 (1963). Another consideration is whether the granting of the mistrial denied the defendant the right to "retain primary control of the course to be followed" at trial. See *United States v. Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

Here, the state trial judge improperly declared a mistrial without first granting, much less exploring, the alternatives requested by the petitioner, namely, polling the jury and/or receiving a verdict on the charge of first degree murder. The state trial judge's denial of the alternatives to mistrial was a constitutionally prohibited ruling, particularly in view of the jury's announcement that it was deadlocked as to the lesser included offenses after the jury had been instructed not to consider the lesser included offenses unless there was reasonable doubt as to the petitioner's guilt of first degree murder. By declaring a mistrial and setting the first degree charge for retrial, the petitioner was denied his right to receive a judgment on the charge of first degree murder from "a tribunal he might believe to be favorably disposed to his fate." *Jorn*, 400 U.S. at 486.

When the charge of first degree murder was unconstitutionally submitted to the second jury, an apparent compromise verdict of guilt was returned as to

the lesser included offense of manslaughter. At that point, the petitioner's case fell squarely within the rule of *Price* where the Supreme Court of the United States announced that in such a case, the jury's verdict as to a lesser included offense does not render harmless the submission to the jury of the jeopardy-barred greater offense.

The defendant in *Price* was charged with murder and the jury found him guilty of the lesser offense of manslaughter. The manslaughter conviction was reversed. Price was retried for murder and reconvicted of manslaughter. The Supreme Court of the United States held that the retrial for murder violated the Double Jeopardy Clause. The state argued that the double jeopardy violation was harmless because the jury convicted Price of manslaughter rather than the jeopardy-barred offense of murder. The Supreme Court rejected the state's argument. The following reasoning from *Price* is directly on point with the case at bar:

> The Double Jeopardy Clause ... is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. *Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.*

Id. at 331, 90 S.Ct. at 1762 (emphasis supplied). The Supreme Court vacated Price's manslaughter conviction

and ordered a retrial on the manslaughter charge only.

The petitioner in the case at bar is entitled to the same relief upon the same reasoning. Indeed, following the second trial, after extensive deliberations the jurors indicated that they were deadlocked as follows: six voting guilty of second degree murder, and six voting not guilty. (VIII:13; IV:61-62). Only after a weekend recess and further deliberations did the jury return its obvious compromise verdict -- guilty of manslaughter with a firearm and carrying a concealed firearm. (VIII:14). As in *Price*: "[W]e cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." *Id.* In other words, had the charge of first degree murder not been submitted, the jury might have found the petitioner not guilty of any offense.

Instead of granting the new trial mandated by *Price*, the state appellate court in the petitioner's case affirmed, citing to the Supreme Court's decision in *Mathews*. *Mathews* is so obviously inapposite that in relying upon that decision rather than *Price*, the state court holding was "contrary to ... clearly established Federal law, as established by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In *Mathews*, the defendant appealed a conviction of aggravated murder, claiming his prosecution for the crime following a separate conviction for the underlying crime of aggravated robbery violated double jeopardy principles. The Ohio Court of Appeals agreed with the defendant but entered judgment against him on the lesser included offense of murder in accordance with an Ohio rule of criminal procedure.

The Supreme Court of the United States found no constitutional infirmity to the Ohio practice because the

defendant failed "to demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense.' 475 U.S. at 247, 106 S.Ct. at 1038. The Supreme Court explained that the presumption of prejudice that was present in *Price* was absent in Mathews' case because "**[t]he jury did not acquit Mathews of the greater offense of aggravated murder, but found him guilty of that charge and, a fortiori, of the lesser offense of murder as well.**" *Id.* (emphasis supplied).

Unlike in *Mathews*, the *Price* presumption of prejudice obviously does apply here because the petitioner was NOT found guilty of the greater offense but was found guilty of manslaughter (which was improperly tried with the jeopardy-barred greater offense of first degree murder). Thus, the state court appellate proceedings are "substantially different from the relevant precedent of [the Supreme] Court," *Williams v. Taylor*, 529 U.S. at 405, thereby warranting relief under 28 U.S.C. § 2254(d)(1).

Pursuant to the controlling precedents of the Supreme Court of the United States, a new trial is mandated to remedy the denial of the petitioner's constitutional rights under the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

CONCLUSION

Based upon the foregoing, the petitioner respectfully requests that this Court order the State of Florida to show cause why the Court should not grant habeas corpus relief by vacating the petitioner's convictions with directions that the State of Florida may retry him for an offense no greater than manslaughter within a prescribed period of time or discharge him forever.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing memorandum was mailed to Office of the Attorney General, 110 S.E. 6th Street, Ft. Lauderdale, FL 33301, this ____ day of March, 2004.

Respectfully submitted,

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